Supreme Court, U.S.
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No. 96-530

In The

Supreme Court of the United States

October Term, 1996

KOREAN AIR LINES CO., LTD.,

Petitioner,

v.

ERIC W. FORMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pp

QUESTIONS PRESENTED FOR REVIEW

The questions as framed by the Petitioner seriously misstate the condition of the record below and the decision by the United States Court of Appeal for the District of Columbia Circuit. An accurate review of the record shows that the Petition for Writ of Certiorari on the issue of whether damages for pre-death pain and suffering are legally cognizable is not ripe for review by this Court because the D.C. Circuit refused to address the substantive issue on the grounds of procedural deficiencies in Korean Air Lines briefing. The questions presented by the Petitioner are more properly stated as follows:

1. Where this Court's decision in *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996) only addressed wrongful death damages and not the existence of a general maritime law survival action for pre-death pain and suffering, does *Zicherman* have any precedential value, as argued by Korean Air Lines ("KAL"), to the D.C. Circuit's refusal to address the legal availability of a pre-death pain and suffering claim?

2. Can the issue of whether there is a legal right to assert a claim for pre-death pain and suffering, which was not passed upon substantively in the lower court, be raised for the first time in the Petition for Writ of Certiorari?

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BRIEF IN OPPOSITION

Respondent, Eric W. Forman, individually and as Administrator of the Estate of Evelyn Forman, deceased, respectfully requests this Court to deny the Petition of Korean Air Lines for a Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in *Forman v. Korean Air Lines*, 84 F.3d 446 (D.C. Cir. 1996).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.1 and 15.2, Eric W. Forman presents the following statement of the case to address the Petitioner's omissions and to supplement the statement of the case presented by the Petitioner. Respondent agrees with Korean Air Lines ("KAL"), however, that the decedent, Evelyn Forman, was killed while a passenger on board KAL flight KE007 on September 1, 1983 and that he brought the action in both his individual capacity and in his fiduciary capacity as Administrator of the estate for his benefit, and for the benefit of the estate of the decedent, for her parents, and for her siblings.

A. Proceedings in the District Court.

Plaintiff's Complaint asserted two distinct causes of action against KAL: a wrongful death cause of action and, as the Administrator of the decedent's estate, a survival cause of action for the decedent's pre-death pain and suffering.

In pretrial motions, KAL moved to limit wrongful death damages to those available under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*, and argued that DOHSA's pecuniary remedies may not be supplemented by non-pecuniary remedies for pre-death pain and suffering under either state law or general maritime law in a survival action. The District Court held that, as to wrongful death remedies, Article 17 of the Warsaw Convention provided the basis for recovering "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. Petition A[1] at 53a. Further, "to the extent that this is contrary to the provisions of DOHSA, the Warsaw Convention shall prevail". *Id.* As to the survival cause of action for pre-death pain and suffering, the District Court made no statement as to the basis for the remedy, but concluded that a Motion for Summary Judgment was not appropriate as there were questions of fact as to what occurred on board the airplane, which questions were material to the pre-death pain and suffering claims. Petition A 53a-54a.

At the conclusion of a jury trial, the jury awarded wrongful death damages for loss of support, loss of services, loss of society, and mental anguish and grief to decedent's husband, Eric W. Forman, and for loss of society and mental anguish and grief to decedent's parents and siblings. The jury awarded a separate category of damages to Eric W. Forman, as Administrator of the estate of his deceased wife for her pre-death pain and suffering.

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[1] "Petition A" refers to the Appendix to KAL's Petition for Writ of Certiorari.

KAL made a post-trial motion for judgment as a matter of law. The District Court reaffirmed its pretrial decision permitting recovery for loss of society damages as created under the Warsaw Convention. Petition A 19a-21a. The District Court also reaffirmed the existence of the survival action claim for the decedent's pre-death pain and suffering created by the Treaty. Petition A 15a-16a. The District Court further set aside the damage awards for survivor's grief as not recoverable as a matter of law under the Warsaw Convention on the basis of this Court's decision in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) and because the Plaintiffs were outside of the "zone of danger." Petition A 22a-24a[2].

B. The Appeal to the United States Court of Appeals for the District of Columbia Circuit.

KAL appealed to the United States Court of Appeals for the District of Columbia Circuit and Respondent cross-appealed.

In its appellant's "Statement of Issues to be Raised on Appeal," KAL raised only the following issues: (1) whether the District Court erred in holding that non-pecuniary damages for loss of society may be recovered in an action governed by the Warsaw Convention (citation omitted) when the death occurs on the high seas within the meaning of the DOHSA (citation omitted) or, in the alternative, whether the District Court erred in

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[2] The District Court also set aside the damage award for loss of financial contributions. This award was reinstated by the Court of Appeals. Petition A 6a-8a.

holding that non-pecuniary damages for loss of society are recoverable by the decedent's financially non-dependent relatives; (2) whether the District Court erred in finding the damage award for the decedent's pre-death pain and suffering was supported by proper and sufficient evidence; (3) whether the District Court erred in finding the damage award for loss of services was supported by proper and sufficient evidence and not excessive; and (4) whether the District Court erred in the calculation and award of pre-judgment interest.

At no time in the pre-briefing filings with the D.C. Circuit, nor in any of the initial briefs, did KAL challenge the legal right of the Administrator of decedent's estate to assert a survival cause of action for pre-death pain and suffering.

While the appeal was pending in the Court below, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). *Zicherman* addressed only the issue of the recoverability of loss of society damages for a case governed by the Warsaw Convention in which the deaths occurred on the high seas. The Court held that the Warsaw Convention was merely a pass-through and that whatever law would ordinarily be applied as the substantive damage law should be applied in a Warsaw-governed case. *Id.* at 636. Where the deaths occurred on the high seas, the *wrongful death* measure of damages is contained in DOHSA. *Zicherman* did not discuss the existence or extent of any survival action remedy for pre-death pain and suffering.

After the Court's decision in *Zicherman*, KAL moved the court below for permission to submit a supplemental

brief. At the posture of the case when the request was made, each party had yet another brief to file. The court below granted leave to address issues raised by *Zicherman* in the briefs yet to be filed.

In its opinion, the court below refused to excuse KAL's tardiness in raising the issue of the legal availability of a right to recover for pre-death pain and suffering, noting that the argument that such damages are not available if DOHSA applies had been raised numerous times before *Zicherman* was decided. *Forman* at 448.

REASONS FOR DENYING THE PETITION

I. *Zicherman* did not address the survival cause of action, so the court below was not required to apply any precedential value to *Zicherman*.

KAL argues that the decision of the court below was in conflict with this Court's decision in *Zicherman* and that the *Zicherman* rationale should be applied retroactively to pending cases, thus eliminating the *Forman* verdict for pain and suffering. Petition at 9-10. However, *Zicherman* does not stand for what KAL says it does.

In *Zicherman*, the Court held the Warsaw Convention acts as "nothing more than a pass-through, authorizing [the Courts] to apply the [damage] law that would govern in absence of the Warsaw Convention." 116 S. Ct. at 636. *Zicherman* only addressed the wrongful death cause of action and measure of damages for deaths that occur on the high seas. However, if one used the "pass-through" procedure on the issue of a survival action for

pre-death pain and suffering, the Court would apply the general maritime law survival cause of action for pre-death pain and suffering and sustain the jury's verdict. This Court has several times implied, without deciding, that there exists a general maritime law survival cause of action for pre-death pain and suffering. *See, Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (noting that several Courts of Appeal had identified a general maritime survival cause of action for pre-death pain and suffering); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) (noting the distinction between the wrongful death remedies and survival action remedies); *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996) (assuming without deciding that *Moragne*[3] encompasses a general maritime survival cause of action).

Several lower courts have specifically identified a general maritime law survival cause of action for pre-death pain and suffering which may be brought simultaneously with a wrongful death action under DOHSA. *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 794-95 (5th Cir. 1975); *Gray v. Lockheed Aeronautical Systems Co.*, 880 F. Supp. 1559, 1569 (N.D. Ga. 1995); *Rye v. United States Steel Mining Co.*, 856 F. Supp. 274, 279 (E.D. Va. 1994); *Chute v. United States*, 466 F. Supp. 61, 69 (D. Mass. 1978); *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F. Supp. 1277, 1285 (W.D. Pa. 1983); *Favoloro v. S/S Golden Gate*, 687 F. Supp. 475, 479 (N.D. Cal. 1987). *But see, Saavedra v. Korean Air Lines*, 93 F.3d 547, 550-554 (9th Cir.

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[3] *Moragne v. States Marine Lines*, 398 U.S. 375 (1970).

1996), Petition for Writ of Certiorari filed October 18, 1996, Docket No. 96-623. Thus, this Court's direction that a pass-through occur would point directly to the survival action remedy under general maritime law for pre-death pain and suffering. Nothing else in the *Zicherman* decision contradicts that result.

KAL argues that "*Zicherman* obligated the Court below to address the question whether non-pecuniary pre-death pain and suffering damages are recoverable under DOHSA, the applicable domestic law in this case," (citation omitted) Petition at 10. In this regard, KAL seriously misstates the *Zicherman* obligation which only requires courts to apply DOHSA to wrongful death remedies. Respondent asserted in the court below that damages for pre-death pain and suffering are created by general maritime law in a *survival action* and *not* as part of the separate, distinct, and identifiable remedies in the wrongful death cause of action under DOHSA.

Because *Zicherman* did not address survival action damages, the court below was not obligated to use it as precedent when it declined to address the issue of the legal availability of survival action damages because of KAL's procedural deficiencies.

Moreover, the decision of the court below is not, as KAL asserts, in direct conflict with the erroneous decision from the Ninth Circuit in *Saavedra, supra*. In *Saavedra*, the Ninth Circuit addressed the substantive issue of the legal availability of the survival cause of action and improperly ignored the distinction between survival remedies and wrongful death remedies, by holding that the damages for pain and suffering were not recoverable. In contrast,

the Court below did not address the substantive issue, but refused to address it because of KAL's failure to initially raise the issue.

The KE007 litigation has been lengthy and torturous. The issue of the availability of a general maritime law survival cause of action for pre-death pain and suffering should be directly addressed by the Court, but not in this Petition. The court below refused to address the substantive issue and this Court would not have the benefit of the lower court's reasoning and analysis in reviewing the matter. Rather, the Court should grant *certiorari* in *Saavedra, supra,* and reverse the Ninth Circuit's erroneous reading of *Zicherman.*

II. The court below refused to address the substantive issue so it cannot be raised for the first time in the Petition for Writ of Certiorari.

KAL was well aware of the distinction between wrongful death damages and survival action damages. Indeed, it argued in the District Court that non-pecuniary damages for pain and suffering should not be awardable. On appeal, it made a tactical decision. It did not address the legal availability of survival action damages in the initial stages of the appeal, but only challenged the sufficiency of the evidence to support the jury's verdict. Because KAL had not preserved the issue, the court below refused to address it. 811 F.3d at 448. This Court would not normally hear an issue that had not been raised or resolved in the lower court, *Youakim v. Miller,* 425 U.S. 231, 234 (1976); *Illinois v. Gates,* 462 U.S. 213,

218-19 (1983) (referring to appeals from state courts), and should not in this case.

KAL's argument to the contrary, *Zicherman* did not change the state of the law that DOHSA does not permit non-pecuniary damages for pre-death pain and suffering *as a wrongful death element of damage. See, Bickel v. Korean Air Lines*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g*, ___ F.3d ___, 1996 W.L. 490375 at 4 (6th Cir. Aug. 29, 1996), petition for rehearing *en banc* denied Oct. 10, 1996:

> The *Zicherman* opinion therefore neither added to, nor made any changes in, the law regarding the availability of non-pecuniary damages under DOHSA. Thus, any argument that KAL could make based on the fact the DOHSA does not allow non-pecuniary damages was available to it before the court decided *Zicherman* and therefore KAL could have raised this issue in its opening briefs. [footnote omitted].

Since *Zicherman* did not change the law and since KAL had abandoned its challenge of the legal availability of pain and suffering damages, it cannot be permitted a "second bite of the apple," particularly where there is no substantive analysis of the issue in the court below for this Court to consider.

CONCLUSION

For the reasons stated herein, this Honorable Court is respectfully requested to deny the Petition.

Dated: October 22, 1996

Respectfully submitted,

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